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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL MAURECE INGRAM,

Defendant and Appellant.

F043433

(Super. Ct. No. BF100571A)

O P I N I O N

APPEAL from a judgment of the Superior Court of Kern County. Clarence Westra, Jr., Judge.

Victor J. Morse, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, J. Robert Jibson and Judy Kaida, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant, Michael Maurice Ingram, was convicted by a jury of second degree murder (Pen. Code,[1] § 187), gross vehicular manslaughter while intoxicated (§ 191.5, subd. (a)), driving while under the influence (Veh. Code, § 23152, subd. (a)), driving with a blood alcohol level of .08 percent or more (Veh. Code, § 23152, subd. (b)), and driving with a suspended license (Veh. Code, § 14601.2, subd. (a)). In a bifurcated proceeding, appellant admitted he had suffered three prior driving while intoxicated convictions and a prior driving with a suspended license conviction. The trial court sentenced appellant to a total term of 15 years to life.

On appeal, appellant contends the trial court erred in failing to give accomplice instructions and a *Dewberry*[2] instruction, and the evidence was insufficient to support his murder and gross vehicular manslaughter while intoxicated convictions. We find appellant's claims without merit and affirm the judgment.

FACTS

On June 21, 2002, Adam Pierce, Alex Lopez and Wayne Yoakum were drinking at a bar in Taft. Appellant joined the trio but at some point the men were asked to leave. The men left in appellant's truck with appellant driving. As they were leaving the bar, appellant hit a large trashcan in the alley. Appellant dropped Lopez off at his residence, and then drove to his own apartment. Appellant's cousin, Cory Shugart, lived next door and joined the men at appellant's apartment. Shortly thereafter, other people, including Lopez, arrived and the group continued drinking and partying.

Yoakum saw appellant drink two beers at the apartment. During the course of the evening Yoakum went out twice to buy more alcohol. On one of his trips to retrieve

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1 All further references are to the Penal Code unless otherwise indicated.

2 *People v. Dewberry* (1959) 51 Cal.2d 548.

more alcohol, Yoakum bought whiskey. According to Yoakum, appellant poured whiskey into a 32-ounce cup and added a little ice and soda, and said that would "top him off for the night." According to Yoakum's fiancée, Kasey Mitchell, she saw appellant earlier that night with a "$5 Special" -- a 32-ounce cup, a liter of Pepsi, and a 1/2 pint of whiskey.

At approximately 9 or 9:30 that night, the group decided to drive out to an open field known as the Bone Yard. Yoakum left with Shugart and appellant drove Lopez and Pierce to the field in his truck. A number of other people, including Robert Bethel and Richard Taylor, had congregated at the Bone Yard to "party." Sometime after arriving, an argument broke out and the group decided to leave and head back into town. Pierce and Lopez left with appellant in appellant's truck. Appellant was driving, Pierce sat in the middle and Lopez sat on the passenger side.

Bethel was driving back in his Jeep with Taylor as his passenger when he noticed appellant behind him. Bethel was on a fairly steep downhill portion of the road when appellant crossed the double yellow lines and passed him in the left lane. Bethel stated he was traveling approximately 30 to 40 miles per hour and appellant was driving 50 to 60 miles per hour. Appellant passed shortly before a curve in the road, and Bethel noticed appellant was traveling "way too fast" to make the turn. Bethel and Taylor stated the passengers in appellant's truck sounded like they were having a good time, and cheering appellant for making the pass. Appellant was unable to make the turn and drove off the road into a field. He was able to return the truck back to the road, but overcorrected and hit an embankment on the right side of the road, causing the pickup to flip over and come to rest on the driver's side.

Bethel stopped, as did a number of other people. Lopez was able to crawl out of the truck through a window. Appellant was trapped partially in and partially out of the truck on the driver's side. Bethel along with a number of others lifted the truck to free appellant. When they lifted the truck, they noticed Pierce trapped underneath the truck.

The group then righted the truck to free Pierce. Lopez stated he had to leave before the police arrived, and someone at the scene gave him a ride home. Some people at the scene kicked beer cans into the bushes to hide evidence of alcohol at the scene.

Pierce was badly injured and Yoakum performed CPR until emergency personnel arrived. Emergency medical technicians arrived at the accident scene at approximately 10:00 p.m. John Todd, an emergency medical technician and a friend of appellant's, found appellant and Pierce injured at the scene. Pierce was transported to the hospital by helicopter and appellant was transported by ambulance. Todd noticed appellant smelled of alcohol, was unresponsive and combative. Appellant told Todd "fuck you cops."

After the accident, Mitchell took Yoakum home. He arrived at his residence about the same time as Lopez and they went to the hospital to check on Pierce. According to Yoakum, on the way to the hospital Lopez stated "I told that mother fucker to slow down." According to Mitchell, Lopez said he told appellant to slow down, "you're going to kill someone" or "you're going to kill us all."

At the hospital, approximately two hours after the accident, appellant's blood was drawn and tested for alcohol. The hospital performed a serum analysis and concluded appellant had a blood alcohol level of .15 percent. A forensic technician also tested appellant's blood, using whole blood analysis, and concluded appellant's blood alcohol level was .12 percent. Criminalist Dan Defraga explained the difference in the levels was due to differing types of tests, and that the two results were consistent. Defraga also noted that a person burns off alcohol at a rate of .02 percent per hour.

Pierce died from his injuries the following morning. The cause of death was severe closed head trauma and crush injuries from the accident. Pierce had a blood alcohol level of .066.

Approximately two to three months after the accident, Todd spoke with appellant. Appellant initially told Todd that Pierce was driving the truck, but later admitted that he was driving when the accident occurred. Appellant said that he had lost control of the

truck because he had no power steering. On another occasion Todd spoke with appellant and asked him if he was aware that a blood test had been performed. Appellant was unaware of this fact and voiced concern about it because it might not help his case if he went to trial, due to the "condition" he was in on the night of the accident.

California Highway Patrol Officer Eric Walker responded to the accident and conducted an investigation into its cause. He based his opinion on witness accounts, as well as the physical evidence at the scene. Walker observed some skid marks on the road, but opined they were not related to the accident. He did find friction marks on the road from where appellant's tires hit the road as the truck flipped over. Although he could not be sure, Walker opined that the truck flipped over one and three-quarter times. Walker explained that Bethel's account of the truck passing on the left and hitting the embankment was consistent with the physical evidence at the scene. However, Walker found no physical evidence that the truck had driven off the road. He opined that the accident was caused by excessive speed, crossing over double yellow lines, and appellant's level of intoxication. Bethel had informed Walker that appellant was driving approximately 60 miles per hour, and Walker explained that it would be almost impossible to make the turn at that speed. Approaching the turn at that speed demonstrated a "serious lack of judgment."

The speed limit on the road where the accident occurred was 55 miles per hour but, according to the basic speed law, the limit would be lower on some turns where it would not be safe to drive at that speed. Walker noted that there were no street lights on the road where the accident occurred. The jury was presented with numerous photographs, a diagram and a video of the road where the accident took place.

California Highway Patrol Officer Donnie Nichols inspected appellant's truck after the accident. Nichols found an abnormal amount of oil buildup on the right rear brake from a leak in the rear axle. Such a buildup could cause the right rear wheel to lock up if the brakes were applied hard causing the truck to pull to the right; however, it would

not have had much effect on the steering or control of the vehicle. If the wheel had locked it would have left a skid mark at the scene. Nichols found nothing else that could have contributed to the accident.

California Highway Patrol Officer Connie Sellers investigated Pierce's death. She interviewed Lopez, who initially told her he was not present at the accident. Subsequently, Lopez admitted he was there and noted that everyone, including appellant, had been drinking fifths of whiskey. He stated appellant was "driving like an idiot" and that he was going too fast to make the turn. Earlier in the evening appellant had been driving off the road through bushes. Sellers also spoke with Taylor who indicated that appellant was driving like "crap" on the night of the accident. In addition, Taylor told Sellers that appellant had almost rolled his truck earlier in the evening, when he drove onto an embankment.

Sellers also interviewed appellant about the accident. Appellant initially stated the truck belonged to his father and he never drove it, but appellant's father had already informed the officer that appellant drove the truck daily. Appellant told the officer that there was nothing wrong with his truck.

Regarding the accident, appellant initially stated he did not remember anything about that evening. Subsequently, appellant admitted to drinking one beer, but no whiskey because he does not like whiskey. Appellant noticed people drinking at the Bone Yard, but he did not drink there. He remembered driving from the area with Lopez and Pierce as his passengers, and then waking up in the hospital. Subsequently, appellant told the officer that all he remembered about the accident was that he was sitting in the middle and told Pierce to "gun it" because the car in front of them was traveling very slowly.

Appellant told Sellers that he had previously taken an alcohol awareness course in order to regain his driver's license. Although he did not complete the course, he recounted five reasons not to drink and drive: (1) he could be hurt; (2) he could hurt

someone else; (3) he could kill someone; (4) he could get in trouble; and (5) it could be very expensive if he were apprehended. He stated that he did not learn anything from the class that he did not already know.

The parties stipulated that appellant had suffered two prior convictions for driving while intoxicated, one in December 1995 and the other in March 2000. Appellant was ordered to attend an alcohol awareness program. Jim McManus, the director of Traffic and Alcohol Awareness School of Kern (TAASK), testified appellant attended the course from February to November 1999. The course teaches of the dangers of driving while intoxicated.

DISCUSSION

I. Appellant was not prejudiced by the lack of accomplice instructions.

Appellant contends that the trial court erred in failing to instruct the jury with accomplice instructions, including CALJIC Nos. 3.11 (testimony of accomplice must be corroborated), 3.12 (sufficiency of evidence to corroborate an accomplice), and 3.18 (accomplice testimony to be viewed with care and caution). He claims the evidence produced at trial was sufficient to find that Lopez was an accomplice and that failure to instruct the jury regarding accomplice testimony was prejudicial to his defense.

Penal Code section 1111 provides in part:

> "A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

When the evidence is sufficient for a jury to conclude that a witness implicating the defendant is an accomplice, the trial court is under a *sua sponte* duty to instruct the jury that they must determine whether the witness is an accomplice. The court must also instruct the jury that the accomplice testimony is to be viewed with distrust and that the

testimony of the accomplice must be corroborated in order to support a conviction. (*People v. Zapien* (1993) 4 Cal.4th 929, 982.)

We need not determine whether there was sufficient evidence to establish whether Lopez was an accomplice because we find that any error in the failure to give the above instructions was harmless. (*People v. Miranda* (1987) 44 Cal.3d 57, 100, overruled on other grounds by *People v. Marshall* (1990) 50 Cal.3d 907.) The purpose of an instruction pursuant to Penal Code section 1111 is to compel the jury to view accomplice testimony with distrust and suspicion. (*People v. Tewksbury* (1976) 15 Cal.3d 953, 967.) Failure to instruct the jury regarding accomplice testimony is harmless where there are other circumstances which would cause the jury to distrust the accomplice testimony, and based upon the entire record it is not reasonably probable that appellant would have received a better result had the instructions been given. (*People v. Miranda*, *supra*, 44 Cal.3d at p. 101; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 26.) Appellant asserts that the failure to give such an instruction constitutes a violation of due process and therefore should be judged under the federal *Chapman* error (*Chapman v. California* (1967) 386 U.S. 18, 24). However, our Supreme Court has held that we use the harmless error analysis under *People v. Watson* (1956) 46 Cal.2d 818, 836. (See, e.g., *People v. Lewis* (2001) 26 Cal.4th 334, 371.)

Here, any failure to instruct the jury to view Lopez's testimony with caution was harmless. Lopez testified during trial in a manner inconsistent with his prior statements to the police and to other witnesses. In addition, Lopez stated that he did not want to testify in the case. At the time of trial, Lopez was in custody for driving with a suspended license. During his testimony, Lopez admitted leaving the scene of the accident before the police arrived, and further admitted lying to the police regarding his presence at the accident. These facts would cause the jury to distrust Lopez's testimony.

In addition, Lopez's testimony was inconsistent. In court, Lopez testified that appellant was driving "all right" on the night of the accident. He further stated that he did

not remember making statements to the effect that appellant was "driving like an … idiot" and that he had told appellant to slow down. He admitted he was drunk on the night in question and continually claimed he could not remember what had happened or what he said that evening. In addition, Lopez denied telling Sellers that appellant had hit something in an alley earlier that evening. Regarding his statements to the police, Lopez stated that he just repeated what the police told him.

Sellers testified that Lopez told her appellant was "driving like an idiot" on the night in question and was going too fast to make the turn. Yoakum and Mitchell testified that Lopez told them he had told appellant to slow down before the accident, which was inconsistent with Lopez's trial testimony; thus, the jury must have viewed all of Lopez's statements with suspicion.

Furthermore, defense counsel argued that none of the parties involved in this case were innocent bystanders. He argued Lopez was "drunk as a skunk" on the night in question, thus calling into question anything he may have said that night. He noted that the witnesses' statements were aimed at keeping themselves out of trouble. The prosecutor pointed out to the jury that it had to decide who in this case was telling the truth. Furthermore, the jury was thoroughly instructed regarding how to evaluate a witness's credibility, particularly where the witness had criminal convictions, or had made inconsistent or willfully false statements (CALJIC Nos. 2.13, 2.20, 2.21.2, 2.22, 2.23.1). Hence, the jury was well equipped to assess the veracity of the witnesses' testimony.

These latter instructions regarding witness credibility served to minimize any harm arising from the failure to explicitly instruct the jury to view Lopez's testimony with distrust. (*People v. Lewis, supra,* 26 Cal.4th at p. 371.) Thus, there was no reasonable probability the jury would have provided appellant with a more favorable verdict had they been instructed to view Lopez's testimony with distrust.

Similarly, the trial court's failure to instruct the jury that accomplice testimony must be corroborated was harmless.

> "…'[T]he failure to instruct on accomplice testimony pursuant to section 1111 is harmless where there is sufficient corroborating evidence in the record. [Citations.] The requisite corroboration may be established entirely by circumstantial evidence. [Citations.] Such evidence "may be slight and entitled to little consideration when standing alone. [Citations.]"' (*People v. Miranda* [, *supra*,] 44 Cal.3d [at p.] 100.) 'Corroborating evidence "must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime but it is not necessary that the corroborative evidence be sufficient in itself to establish every element of the offense charged." [Citation.]' (*People v. Sully* (1991) 53 Cal.3d 1195, 1228.)" (*People v. Zapien*, *supra*, 4 Cal.4th at p. 982; see also *People v. Hayes* (1999) 21 Cal.4th 1211, 1271; *People v. Frye* (1998) 18 Cal.4th 894, 966.)

Lopez's testimony was more than adequately corroborated. Yoakum testified appellant was driving the truck when they left the Bone Yard. In addition, the position appellant was found in after the accident suggested he was the driver, and appellant admitted to Todd that he was driving prior to the accident. Lopez's statements indicating appellant was driving poorly on the night in question were also corroborated by other witnesses. Yoakum testified appellant hit a trashcan in an alley after leaving the bar. Taylor stated appellant was "driving like crap" on the way to the Bone Yard. He told the officers that appellant had almost rolled the truck earlier that evening.

Lopez's statements to the effect that appellant was driving too fast were also corroborated by other evidence. Bethel testified appellant was driving "way too fast" to make the turn. Officer Walker opined that the accident was caused by appellant's "[e]xcessive speed" and intoxication level. Furthermore, appellant admitted he knew of the risk of driving while intoxicated and the jury could infer that he consciously disregarded it. Since Lopez's testimony was amply corroborated, any error in failing to instruct the jury regarding the corroboration requirement for accomplice testimony was harmless.

II. The jury was adequately instructed.

Relying upon *People v. Dewberry, supra,* 51 Cal.2d 548, appellant contends that the trial court's instructions on how the jurors were to decide between lesser and greater offenses were incomplete. We disagree.

In *People v. Dewberry, supra,* 51 Cal.2d at page 555, the court held that "when the evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense, the jury must be instructed that if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty only of the lesser offense. [Citations.]" If a case involves a lesser included offense, then a *Dewberry* instruction is required to be given sua sponte. (*People v. Aikin* (1971) 19 Cal.App.3d 685, 703-704, disapproved of on other grounds in *People v. Lines* (1975) 13 Cal.3d 500, 514.) The *Dewberry* requirement is embodied in CALJIC No. 8.72, which was not read to the jury in this case.

The trial court did instruct the jury with CALJIC No. 17.10, which stated in part, "If you are not satisfied beyond a reasonable doubt that the defendant is guilty of a crime charged, you may nevertheless convict [him] of any lesser crime, if you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime." Several courts have concluded that this admonition satisfies the *Dewberry* requirement. (*People v. Crone* (1997) 54 Cal.App.4th 71, 76; *People v. St. Germain* (1982) 138 Cal.App.3d 507, 520- 522; *People v. Gonzalez* (1983) 141 Cal.App.3d 786, 793- 794, disapproved on other grounds in *People v. Kurtzman* (1988) 46 Cal.3d 322, 330; see also *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1262.)

Appellant relies upon *People v. Reeves* (1981) 123 Cal.App.3d 65, 70 (disapproved on other grounds in *People v. Sumstine* (1984) 36 Cal.3d 909, 919, fn. 6), to support his contention. However, this case has not been followed because, "CALJIC No. 17.10 enunciates what *Reeves* finds that it does not: namely, ... it instructs the jury that if it finds the prosecution has not sustained its burden of proving each element of the

greater of the offenses beyond a reasonable doubt, but finds that the prosecution has sustained its burden of proving the elements of the lesser offense beyond a reasonable doubt, then it must return a guilty verdict of the lesser offense only." (*People v. St. Germain, supra,* 138 Cal.App.3d at p. 522, fn. 9; see also *Gonzalez, supra,* 141 Cal.App.3d at p. 794, fn. 8 ["We disagree with anything in *Reeves* which indicates that CALJIC No. 17.10 by itself was in any way insufficient"].)

Likewise, we are not persuaded by *Reeves.* The opinion contains no meaningful analysis of why it found CALJIC No. 17.10 inadequate. The court merely reiterated the defendant's argument that the greater and lesser offenses should be considered together, and stated that the defendant "appear[ed] to be correct" that the instructions as given were in error. The court then immediately went on to discuss why the error was harmless, finding the evidence of guilt was "overwhelming." (*Reeves, supra,* 123 Cal.App.3d at pp. 69-70.) We recognize there may be a distinction between informing jurors they must give the defendant the benefit of any reasonable doubt as to the nature of the offense, and advising them that if they have a doubt the defendant committed the greater offense, they may return a verdict on the lesser. Nevertheless, CALJIC No. 17.10 conveys the essential principle the jury must choose the lesser offense if it entertains a reasonable doubt as to the greater crime. The instruction correctly informed the jurors they should not convict defendant of the crimes charged if they harbored a reasonable doubt as to any element of those crimes.

Moreover, in addition to reading CALJIC No. 17.10, the court also read the standard instruction on reasonable doubt to the jury (CALJIC No. 2.90). Read together, those instructions clearly informed the jury that the People bear the burden of proving guilt beyond a reasonable doubt. (See *People v. Espinoza* (1992) 3 Cal.4th 806, 824.) In addition, the trial court instructed the jury with CALJIC No. 2.01, which provided in part, "If the circumstantial evidence [as to any particular count] permits two reasonable interpretations, one of which points to the defendant's guilt and the other to [his]

innocence, you must adopt that interpretation that points to the defendant's innocence, and reject that interpretation that points to [his] guilt." Our Supreme Court has concluded that similar language effectively functions as a *Dewberry* instruction. (*People v. Musselwhite*, *supra*, 17 Cal.4th at pp. 1262-1263; but see *People v. Crone, supra,* 54 Cal.App.4th at pp. 77-78.)

III. Sufficient evidence supports appellant's convictions.

When the sufficiency of the evidence is challenged on appeal, the court reviews the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence--that is, evidence that is reasonable, credible, and of solid value--from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Welch* (1999) 20 Cal.4th 701, 758; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence, including reasonable inferences based on the evidence and excluding inferences based on speculation or conjecture. (*People v. Tran* (1996) 47 Cal.App.4th 759, 771-772.) If the jury's findings are supported by the evidence and are reasonable, the appellate court will not reverse merely because a different finding might also be reasonable. (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) The question on appeal is whether substantial evidence supports the jury's conclusion, not whether guilt was established beyond a reasonable doubt. (*People v. Hillery* (1919) 62 Cal.2d 692, 702-703.) "The same standard applies to the review of circumstantial evidence. (*People v. Bean* (1988) 46 Cal.3d 919, 932.)" (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138.)

Appellant contends his convictions for second degree murder and gross vehicular manslaughter while intoxicated were unsupported by the evidence. We conclude the evidence was sufficient to support the convictions.

A. Second degree murder

As appellant acknowledges, a death caused by a drunk driver may be prosecuted as second degree murder on a theory of implied malice. (*People v. Watson* (1981) 30 Cal.3d 290, 296-299.) A second degree implied malice murder conviction is supported where the defendant deliberately commits an act, the natural consequences of which are dangerous to life, with the knowledge of dangers to life and a conscious disregard of those dangers. (*Id*. at p. 300.) This is a subjective standard requiring that the defendant actually appreciate the risk involved. (*Id*. at pp. 296-297.)

In *People v. Talamantes* (1992) 11 Cal.App.4th 968, 973, the court listed a number of factors courts have relied upon in upholding drunk driving murder convictions: "(1) a blood-alcohol level above the .08 percent legal limit; (2) a predrinking intent to drive;[3] (3) knowledge of the hazards of driving while intoxicated; and (4) highly dangerous driving." Appellant concedes the first three factors were met, but argues no evidence supports the remaining factor. In addition, he contends that the remaining three factors were substantially less aggravated than in other cases that have upheld second degree murder convictions. Finally, he claims his culpability was reduced by the fact that his passengers encouraged his unsafe driving maneuver. We find these arguments devoid of merit.

Appellant tries to minimize his blood alcohol level and his knowledge of the dangerousness of driving while intoxicated; however, we find the evidence presented was sufficient to support each factor. Evidence was presented establishing appellant had a blood alcohol level of .16 percent at the time of the accident, twice the legal limit. That

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3 Appellant makes no argument regarding this factor; therefore, we will not discuss it.

other cases upholding drunk driving murder convictions involved even higher blood alcohol levels is of little consequence.

Regarding appellant's prior knowledge of the hazards of driving while intoxicated, the jury was informed that appellant had suffered two prior convictions for driving while intoxicated and that he had been ordered to attend TASSK courses. McManus, the director of the program, stated that it teaches about the dangers of driving while intoxicated, including the fact that a drunk driver can kill someone. Appellant attended the course from February to November 1999. Appellant told Sellers that he had attended the TASSK course and that he had learned he could hurt or kill someone by driving drunk. This information was more than sufficient to demonstrate that appellant knew of the dangerousness of driving while intoxicated.

Appellant spends the bulk of his argument on his driving on the night of the accident. Rather incredibly, appellant argues that his driving on the night of the accident, while "unsafe," cannot "reasonably be viewed as highly dangerous." We disagree. The evidence established that after a long night of drinking, appellant, along with two passengers, drove from the Bone Yard. Appellant left after dark and the road contained no streetlights. While driving down a fairly steep part of the hill, appellant decided to pass Bethel who was in front of him. Bethel estimated his own speed at 30 to 40 miles per hour, and appellant's speed at 50 to 60 miles per hour. In order to pass Bethel, appellant crossed the double yellow lines and traveled on the left side of the road as the vehicles approached a turn in the road. According to Bethel, appellant was traveling "way too fast" to make the turn and drove off of the road into a field. Appellant was able to return to the road, but apparently overcorrected and hit an embankment on the right side of the road and flipped the truck.

Taylor similarly testified that appellant was traveling fast and drove off the road after passing Bethel by crossing over double yellow lines. Walker opined the accident was caused by appellant's intoxication level, driving at an excessive speed and crossing

over double yellow lines. Walker further testified that it would be nearly impossible for a person to make the turn at 60 miles per hour and stay within the lane. An investigation of the scene revealed appellant left no skid marks prior to the accident, indicating he never applied his brakes. This evidence established appellant was driving in a highly dangerous manner.

Appellant points to the fact that the posted speed limit was 55 miles per hour to support the argument that his driving was not dangerous. In addition, he notes that no evidence was produced establishing what a safe rate of speed would have been around that corner. While the speed limit may have been 55 miles per hour on the road generally, the officers noted that some corners required a lower speed. Everyone who witnessed the accident stated appellant was driving at an excessive speed around the corner. The fact that appellant's speed was excessive was demonstrated by the fact that appellant lost control of his truck on the turn. In addition, the jury was presented with photographs and a video of the stretch of road where the accident occurred, and could determine if appellant was driving at a dangerous rate of speed. Furthermore, the jury was informed that Bethel was driving 30 to 40 miles per hour on the road, indicating that this was a safer speed.

Appellant argues defendants in other drunk driving murder cases exhibited much more dangerous driving maneuvers, indicating that the evidence in this case was insufficient to support the verdict. Appellant's attempt to distinguish his behavior from other cases is unpersuasive. We note that each case must be decided on its own facts, and the evidence in this case is sufficient to establish the crime.

Furthermore, the facts here are similar to other cases where a second degree murder conviction has been upheld. In *People v. Ricardi* (1990) 221 Cal.App.3d 249, 254, the defendant, after drinking more than 10 beers, drove his truck to another city. On his way, the defendant drifted from his lane, crossed a center divider, hit a road sign, and collided head-on with another car traveling the opposite direction. In noting the evidence

was sufficient to sustain a second degree murder conviction, the court explained the defendant was speeding prior to the accident and found the jury could infer that the defendant knew he would drive after being intoxicated and could infer malice from the fact that the defendant had a number of prior convictions and attended alcohol treatment programs. (*Id*. at p. 260, fn. 5.) In *People v. McCarnes* (1986) 179 Cal.App.3d 525, the court found sufficient evidence of malice in a drunk driving murder case where the defendant drove at a speed of over 65 miles per hour in a 55-mile-per-hour zone and passed another vehicle by crossing over a double yellow line on a two-lane highway and striking an oncoming vehicle. (*Id*. at p. 528.) The court described the defendant's driving as "extremely reckless." (*Id*. at p. 533.)

Likewise here, appellant was traveling at an excessive speed and passed another vehicle by crossing into the lane designated for oncoming traffic while on a steep downhill portion of the road and approaching a turn. Appellant lost control of his truck and drove off of the road and back onto the road, ultimately overcorrecting and flipping his truck. Such a maneuver can certainly be considered "highly dangerous."

Additionally, the evidence established appellant was driving poorly prior to the accident. Appellant struck a trashcan in an alley after leaving the bar. Lopez told Sellers that appellant had been driving like an "idiot" prior to the crash. Lopez also told Sellers that appellant was driving his truck off the road and through bushes on their way to the Bone Yard. Taylor told Sellers that appellant had been "driving like crap" prior to the crash, and that he drove up onto an embankment and almost rolled the truck.

Appellant again tries to compare his actions with the driving patterns found in other cases of drunk driving murder to argue that the evidence was insufficient to support his conviction. We find the argument unavailing. We note that in *People v. Ricardi*, *supra*, there was no evidence of reckless driving prior to the fatal crash, yet the court concluded sufficient evidence existed to support the conviction. Here, appellant did

engage in reckless driving, as is evidenced by the fact that he struck a stationary object, drove off of the road and was described as driving "like an idiot."

The evidence in this case was more than sufficient to support a finding that appellant knew the risks of driving while intoxicated, consciously disregarded those risks and engaged in reckless driving that resulted in the victim's death. Thus, the evidence was sufficient to support his conviction.[4]

B. Gross vehicular manslaughter while intoxicated

The elements of gross vehicular manslaughter are: (1) driving a vehicle while intoxicated; (2) committing an unlawful act with gross negligence while driving; and (3) as a proximate result of the unlawful or negligent act, another person was killed. (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1159; CALJIC No. 8.93.) "Gross negligence is the exercise of so slight a degree of care as to raise a presumption of conscious indifference to the consequences. [Citation.]" (*People v. Bennett* (1991) 54 Cal.3d 1032, 1036.) Appellant contends the evidence was insufficient to support his conviction for gross vehicular manslaughter while intoxicated. Specifically, he claims there was no evidence from which the jury could infer that he acted with gross negligence. We disagree.

Appellant argues that, at most, his actions could be considered only negligent, not grossly negligent. To support this argument, appellant relies on a number of cases that

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[4] Appellant argues that he is somehow less culpable because his passengers encouraged his dangerous driving on the night in question. While there was some evidence that the passengers were cheering and sounded like they were having fun, evidence was also presented the Lopez told appellant to slow down before the crash. Thus, the jury may not have believed that the passengers encouraged appellant's behavior. Even if the jury did find the passengers encouraged appellant's dangerous driving, the jury was still entitled to infer that appellant knew his actions were dangerous to life and consciously disregarded that risk.

have upheld convictions for gross vehicular homicide and argues that his behavior was not as egregious as in other cases. Not so. Rather, we find appellant's case strikingly similar to *People v. Ochoa* (1993) 6 Cal.4th 1199.

In *Ochoa*, the defendant drank 17 to 22 beers during the course of a day. In the early morning hours of the next day, the defendant drove home. The defendant entered the freeway driving a speed of 60 to 70 miles per hour. The defendant was driving in the left lane of the freeway. Witnesses observed the defendant merge into the middle lane without signaling, a short distance in front of other vehicles, and then suddenly return to the left lane. The defendant ultimately struck the rear left portion of another car causing it to spin into a tree, killing its passengers. (*People v. Ochoa*, *supra*, 6 Cal.4th at pp. 1202-1203.) Other evidence established that the defendant had previously been convicted of driving while intoxicated and had attended classes informing him of the dangers of such an action. (*Id*. at p. 1203.) It was determined that the defendant had a blood alcohol level of .15 percent at the time of the collision. (*Ibid*.)

From this evidence, the court concluded the jury could infer that the defendant

> "(a) having suffered a prior conviction for driving under the influence of alcohol, (b) having been placed on probation, (c) having attended traffic school, including an alcohol-awareness class, and (d) being fully aware of the risks of such activity, nonetheless (e) drove while highly intoxicated, (f) at high, unsafe and illegal speeds, (g) weaving in and out of adjoining lanes, (h) making abrupt and dangerous lane changes (i) without signaling, and (j) without braking to avoid colliding with his victims' vehicle." (*People v. Ochoa*, *supra*, 6 Cal.4th at p. 1208.)

Similarly here, appellant had previous convictions for driving while intoxicated, had been placed on probation, attended traffic school informing him of the dangers of driving while intoxicated, drove with a blood alcohol level of .16 percent at an excessive speed, made an unsafe passing maneuver, crossed over double yellow lines while approaching a turn, drove off the road due to his speed, returned to the road, hit an embankment and flipped his truck, killing one of his passengers. Applying an objective

test, a reasonable person in appellant's circumstances would have been aware of the dangerous nature of his behavior. Thus, the evidence was sufficient to support a finding of gross negligence.

DISPOSITION

The judgment is affirmed.

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Levy, J.

WE CONCUR:

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Harris, Acting P.J.

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Gomes, J.